



NIRC-ICSI *Insight*

NEWSLETTER

Focus on
"Research Paper
Competition 2014"

Theme of NIRC-2014: Change, Emerge & Lead

National Best Regional Council (2004, 2007, 2008, 2009, 2010 & 2011)

Dear Professional Colleagues,

The Month of August has the special mention in the history of our nation. 67 years ago, on 15th of August, India attained independence from 200 years of British Rule.

It was independence not alone from a colonial power but it was an independence from tyranny, submission and humiliation. Gandhi, Bose, Azad and many more great leaders had their names inscribed in golden letters in the history of our nation. Those were great men who showed resilience and perseverance and when the time came laid down their lives for the one cause of liberating our nation from ignorance.

67 years has passed since then. For the first time we have our Prime Minister who is not born before independence. Leaders from that era has taken us this far. Now it is imperative on us to take the baton forward with the same zeal and character.

Few men in the world have the privilege to die for the nation. We might not have that privilege but we do have our lives which we can live for the sake of our nation.

We as professionals do have our lives to contribute for the overall well-being of our nation. When the Prime Minister of our nation gives his maiden speech from the hallows of the Red Fort. Let it not be just another speech. Let it not be just another sermon of our greatness. Let it not be the hollow vision of our future repeated every year.

Let it bring to the fore the love for our nation. Let it bring to the fore the commitment we owe to our mother nation. Let it charge us enough to unshackle the status quo and move with the vigor and spirit that shall convey to the world that India is up and awake to take back its position as the leader of the nations.

I would conclude with the last four lines of a poem by Robert Frost:

"The woods are lovely, dark and deep.
But I have promises to keep,
And miles to go before I sleep,
And miles to go before I sleep."

With best regards,

CS Shyam Agrawal
Chairman

NIRC-ICSI WISHES ALL MEMBERS A HAPPY 68TH INDEPENDENCE DAY

The Regional Council

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Disclaimer:

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Printed & Published by :

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Dear Professional Colleagues,
"Focus on Skill, Scale and Speed to compete"

- Narendra Modi, Prime Minister, India

15th August, 1947, the day of our Independence, marked the end of 200 years of British rule and we were at the end able to attain "Swaraj - The Power to Self-Govern". "Swaraj" might be the culmination of a long fought battle with the British but it was also a dawn of new era for our country. In the present day scenario, we need to Re-visit our capabilities of "Swaraj" and Re-invent our model of self-governance and develop enough strength to stand up to the comity of nations. The Companies Act, 2013 is a prime example of reinventing the tenets of self-governance.

With the vision of Skill, Scale and Speed we shall hope to make a better future for ourselves, our society and our country at large. Company Secretary Professionals shall seek to enhance the skill by adopting the model of "Collaborative Commerce" and focusing on the research capabilities. Company Secretaries will have to scale up by identifying opportunities in their area of work and simultaneously explore different avenues for growth. With the advent of technology in all aspects of life, Company Secretaries shall enhance their service delivery capabilities and thereby focusing on speed.

The month of July is of great importance for Northern India Regional Council (NIRC) as 31st July is the Foundation Day of NIRC. We at NIRC celebrated the 43rd Foundation Day by organising week long programs from 25th July, 2014 to 31st July, 2014 for members and students which was inaugurated by CS R Sridharan, President, ICSI.

NIRC has inaugurated a new Library for our members. The library shall boast of books encompassing the subject and topics of corporate relevance. The library is Wi-Fi enabled and members will have access to India's Premier e-library on Corporate / SEBI and Business Laws etc.

NIRC has launched the webpage for "CS Women Professionals" on the portal of NIRC. The web page will provide services like posting your resumes, professional updates, laws related to women, motivational articles, tips on work-life balance, stress management, sharing achievements, articles, and many more.

To mitigate the concerns of the members regarding the difficulties in interpretation and implementation of certain sections and rules made under the Companies Act, 2013, a new initiative "Ask the seniors" was taken and we are glad to have received good response from the members. Owing to the good response from our members the first session of the series was held at the premises of NIRC and CS Suchita Koley interacted with members through telephone on Inter Corporate Deposits, Fixed Deposits, Related Party Transactions and Registration of Charges and I am happy to share that we have received calls even from members working out of India.

In an initiative for our Young Members we have decided that the various activities, like seminar, conferences etc., organized by NIRC will be made available to young members as a platform to hone their communication and presentation skills. The Young Members will be provided with an opportunity to coordinate the sessions as is being done by the Regional Council Members. In this endeavour we had given opportunity to few young members in the programs organised by NIRC.



NIRC in continuity of its endeavour to expand the domain and horizon of members of ICSI, submitted a representation to Hon'ble Justice Sanjeev Sachdeva, Company Judge, Delhi High Court, requesting for empanelling the Practicing Company Secretaries to be appointed as Chairperson/Alternate Chairperson in the Court convened meetings ordered under the directions of the Hon'ble Delhi High Court, response to which was seemingly positive.

We also submitted the copy of representation, to include the Company Secretary in Practice, to appear before the VAT authorities by amending Rule 50(1) & Sub Rule (2) of Rule 2 of The Uttarakhand Value Added Tax Rules, 2005, to Dr. M C Joshi, Hon'ble Secretary of Finance, Government of Uttarakhand.

I, with the support of CS Girish Goyal, Chairman, Jaipur Chapter and his team met Shri Shikhar Agarwal (IAS), Commissioner, Jaipur Development Authority, Govt. of Rajasthan and requested him to allot a land to develop Centre for Excellence for members & students to promote research & other activities. He was also requested to work out a proposal to allot residential land/plots on very concessional rate to Company Secretaries in the township/residential schemes of Government of Rajasthan. If feasible, Government may develop a specific colony for professionals including Company Secretaries.

NIRC in its constant endeavour to build the profile of students and make them competitive and at par with best of the talent available in the country, we have planned and organised various student activities throughout the Northern Region. We have organized a Mega Students' Regional Conference on the theme "CS the Creative Spark" at Airforce Auditorium, New Delhi. The Conference was attended by a large number of students with the venue overflowing beyond its capacity. We have also organised National Level Company Law Quiz, Regional Elocution Competition, Spelling Bee Competition, Motivational and personality development sessions etc.

The NIRC has launched the e-newsletter especially for the students to integrate research publication, professional updates, latest development in the profession etc. under the single platform. Members are also requested to extend a helping hand towards the profession by motivating students to participate in research activities.

In this era of cut throat competition any educational institutes' survival lies solely on the quality of the faculty. Therefore NIRC has constituted a panel to identify best of faculty from the available talent pool. This initiative has certainly improved the quality of the faculty and brought in the transparency in the appointment of the faculty. NIRC is organising Crash Course for students appearing in December, 2014 Examinations of the Institute for the Foundation, Executive & Professional Program from 20th August, 2014 at ICSI-NIRC Building.

The Convocation of Northern Region is going to be held on Saturday the 16th August 2014 at New Delhi to award the certificate of membership of the Institute to newly qualified members. The convocation would enable the newly qualified members to feel about the dignity of being a member of the Institute and to generate belongingness amongst the members with the Institute.

To build the capacities of our members and students and to explore the inherent potential, the NIRC decided to reach out to the second tier chapters. We have organised Two Day Regional Conference at Dehradun on the theme "EMERGENCE OF COMPANY SECRETARY PROFESSION - COMPANIES ACT, 2013" and series of programmes are planned for the coming months.

The idea of 15 Day Class Room Series on Companies Act, 2013 was well attended and appreciated by the members. Seeing the response, we have planned to organise such class room series for other relevant laws.

Since the members are grappling with the contentious issues of the Companies Act, 2013 and to mitigate their concern NIRC has organised the workshops based on posers and FAQs on Contentious issues. Similar programmes will continue to be held in coming months throughout the Northern Region.

NIRC has always believed in providing best infrastructure facilities for its members and students and following the same we have proposed number of infrastructure projects across the region. We are glad to share with you that we have recently laid the Foundation Stone for the New Building of Faridabad Chapter.

NIRC is committed to extend all its resources towards building the capacity for research orientation and publication for our members and students throughout the Northern Region. In the series, we have organized Research Paper Competition 2014 and we have a slew of measures planned to further build the research capacities.

It has been observed that as a practice the members of the Northern India Regional Council are the regular speakers in the 15 Day MSOP organized by NIRC. Though it can be claimed that the Regional Council Members taking the sessions is beneficial to the students in terms of knowledge possessed and shared by them and to the institute as well, as the members do the service on the honorary basis. But we feel there is a large untapped knowledge resource available in the industry, academia, regulators and other professionals whose knowledge and services can be utilized for the benefit of the students. This way we can open up the profession and reach out to different sectors and enhance the scope of our new members in finding new avenues of growth. So we have decided that the Regional Council Members shall make way for the other experts to take the sessions.

On 30th July, 2014, the Annual General Meeting of NIRC was convened at Hotel Holiday Inn, Mayur Vihar, New Delhi. It is always a special moment for NIRC, when large number of members and past representatives of NIRC have come together to interact with the Regional Council of the Northern Region on the day of Annual General Meeting. The meeting was very lively and interactive. The members present in the meeting have given their valuable suggestions and I, as a Chairman of NIRC tried to assuage the concerns of the members and responded on the sentiments and suggestions of the members to the best of their satisfaction. We have discussed the sentiments and suggestions of the members in our Regional Council Meeting and council unanimously decided to share the sentiments and suggestion related with the working of ICSI-HQ with the president, ICSI.

Friends, considering the technological advancement and future prospects of the profession, we have decided:

- To make the building of the NIRC wi-fi enabled with the view that the members and the students will be able to access the contents of e-library;
- To completely renovate the Auditorium at ICSI-NIRC building to provide better facilities;
- To purchase the floor space for building a conference hall for the activities conducted by NIRC. The motive behind the building of conference hall is to bring down the cost of various paid activities organised by NIRC for the benefit of students and members.

I believe these measures will go a long way in further extending the influence of the profession.

Friends, I honestly assure you that I will do my best to carry out the professional development activities of NIRC in a high spirit and shall make path-breaking efforts to achieve greater heights for the profession. This would be possible only with your kind support and guidance. I request you to come forward and join hands to carry the flag of the Institute to newer heights. Interact with me at chairman.nirc@icsi.edu.

Regards

Yours sincerely,



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मेरा सलाम

यह है मेरी कविता, स्वतंत्रता के नाम।
यह है मेरा सलाम, शहीदों के नाम।
आज फिर याद आया, भारतीयों का बलिदान।
याद फिर है आया, स्वतंत्रता का संग्राम।
आज वक्त है आया, तिरंगे की शान का।
वक्त फिर आया, देश के सम्मान का।
कर लो तुम प्रण, भारत के निर्माण का।
तुम्हारा हर इक प्रयास, अवश्य ही लाएगा विकास।

जय हिन्द

सीएस पायल कटारिया

INVITATION FOR CONTRIBUTION OF ARTICLES & SUGGESTIONS FOR IMPROVEMENT OF CONTENTS OF NIRC NEWSLETTER

NIRC of ICSI invites Articles from Members for publication in the NIRC Newsletter. Members are also requested to forward their comments/suggestions for further improvement of contents of Newsletter. Members may send the soft copy of their article and profile to NIRC by email to chairman.nirc@icsi.edu for consideration by the Editorial Board.

ATTENTION MEMBERS/STUDENTS

The details of Members Programs like Seminar, Conferences, etc. and soft copies of **NIRC-ICSI Newsletters** & Students' programs viz EDP, SIP, PDP, MSOP, Students Activities, such as viz Moot Court Competitions, Elocution Competition, Essay writing, Company Law Quiz and Student Conferences are regularly updated on the NIRC Portal at ICSI website.

To get updated information, Members & Students are requested to visit our following website regularly.

www.icsi.edu/niro

INDEPENDENT DIRECTOR- A CONSCIOUS KEEPER FOR CORPORATE GOVERNANCE*

– CS Nishant Garud, nishantgrd44@gmail.com

The Companies Act, 2013, sets to overhaul the provisions relating to independent directors entirely by conferring greater power and responsibility in the governance of a company. There are no explicit provisions for independent directors under Companies Act 1956 and only clause 49 of the Listing Agreement¹ prescribed for the induction of independent directors and made it mandatory for listed companies. Thereafter, the Ministry of Corporate Affairs carried out corresponding changes to the provisions of 1956 Act, in an attempt to include the requirement of having an independent director on the board of listed companies to oversee corporate governance. However, such attempts proved to be futile as the changes failed to explain the roles, duties or liabilities of independent directors lucidly. Board's independence from external influences is critical and directly proportional for effective corporate governance. Thus, the need for comprehensive and strong legislation relating to independent directors became vital and eventually led to the enactment of the Act. The present e-news line discusses the specific changes relating to independent directors proposed by the Act and analyses their pros and cons.

To encourage good governance in the corporate sector, based on past experience the lawmakers in consultation with corporate leaders and other noted experts fine-tuned the regulatory mechanism and about 10 years back, made it mandatory to have independent persons - persons who have no financial stakes in the company and are in no way involved in the functioning of the company - on the board of directors, and are called independent directors. The functions these independent directors are expected to perform is to question various decisions made by the board, keeping in mind the interests of the society at large and also balancing it with the need for the company to survive and thrive. Primarily, they are expected to be unbiased, neutral, professional, honest, straightforward and frank candidates and most importantly, have a mind of their own. But, in a realistic world, it's a tall order.

INDEPENDENT DIRECTORS

under Companies Act, 1956

- Not applicable to unlisted companies (whether public or private)
- Applicable only to listed companies: 1/3rd to ½ of total directors to be independent directors (depending upon executive/non-executive nature of chairman).

under Companies Act, 2013:

- Requirement: 1/3rd of total directors to be independent directors.
- Applicability:

- listed co.'s
- Companies notified by Central Govt i.e. as per draft rules:
 - (a) Public co.s with paid up share capital in excess of INR 100 crores or
 - (b) Public co.s with outstanding loans/borrowings/debentures/deposits in excess Of INR 200 crores

Companies Act, 2013 also requires

- At least 1 independent director in CSR Committees (applicable to co.s with a net profit of > 5 crores OR net worth of > 500 crores OR turnover of > 1000 crore)
- Majority of directors in audit committees to be independent directors (applicable to listed co.s and co.s prescribed by Central Govt).
- ½ of directors in Nomination & Remuneration Committee to be independent directors (applicable to listed co.s only)

Who is an independent director under Companies Act, 2013?

- Definition of independent director under Companies Act, 2013 wider in scope than listing agreement/SEBI ESOP guidelines.
 - Criteria based on:
 - (a) Independence from Management
 - (b) Independence from Promoter Group
 - (c) No substantial shareholding
 - (d) Other significant relationship which may cause a conflict of interest.
 - Term:
 - 5 (original term) + 5 years (additional term subject to a special resolution). After expiry of term individual ineligible for re appointment for 3 years.
 - Tenure to be non-rotational
- Code of Conduct under Companies Act:
 - Schedule IV sets out a code of conduct for the role, responsibilities and functions of the independent director.
 - Guidelines to be complied by the companies on manner of appointment, re-appointment, resignation or removal of independent directors.
 - Independent directors to hold at least one meeting in a year to review performance of non-independent directors and board.

This Article is an award winning Article in the Research Paper Competition, 2014 organized by NIRC.

**Views expressed by the Authors are solely their own view and the Firm, NIRC or ICSI does not accept any responsibility.*

- Evaluation mechanism to be put in place by Board: to evaluate performance of each independent director.
- Penalty for non-compliance of independent director provisions:
 - Who will administer independent director compliances?
 - Double penalty for non-compliance - under Companies Act and SCRA.
 - Penalty under Companies Act, 2013; INR 50,000 to INR 5,00,000 v. upto imprisonment upto 10 years or fine upto INR 25 crores under the SCRA.\
- Who are Independent Directors?

Certain Minimum Requirements, Varied Model

"Impartial. Unable to perceive any promise of personal advantage from espousing either side of a controversy."

Ambrose G. Bierce, 19th century American writer

Spotting Independent Directors in the Wider Web of Things

With the Satyam fiasco still fresh in our memories, newspapers and journals have been set abuzz with articles and reports proclaiming the need to strengthen our corporate governance systems day in and day out. Corporate governance is the new mantra; an old concept being pursued with a newfound vigor. The appointment and functioning of Independent directors is part of a larger scheme to bring about more accountability into the working of corporations.

It is undeniable that the corporate scenario has undergone a sea of change over the last few decades. There is an increase in the variety of stakes in the modern corporation and a diversification of the equity capital leading to larger distance between capital owners and capital managers. There is a strong undercurrent giving rise to the institutional investors which have in turn allowed the corporations to expand their presence, economically and physically, over trans-national boundaries.

Change must follow change. In this case, it is a matter of the system keeping pace with the realities. It is only expected of corporate governance to attempt to reconcile the functioning of the corporations with these emergent ground realities, which often vary from one country to another.

The fundamental purpose behind the appointment of independent directors is, so to speak, impartiality. Companies wish to identify directors who are capable of dispensing their duties without any conflict of interest in their judgment. To ensure this, there are certain guidelines which must be borne in mind while appointing independent directors. While a rigid definition would prove to be more detrimental than beneficial, the company must take a flexible stand in view of the prevailing circumstances to ensure that the following criteria are best met.

Defining an "Independent Director"

According to the indicative definition by the International Finance Corporation ,

Independent directors must fulfil a prescribed minimum criterion of requirements. These requirements ensure the integrity of their ability to make decisions which are not influenced by circumstances extraneous to the interests of the company, i.e. they reduce the scope of interference by such circumstances.

1) The IFC Model

The IFC definition mandates that only those individuals may be considered for appointment as independent directors who have not been employed by the company or its Related Parties in the past five years. Moreover, they should not be affiliated with a company that is an advisor or consultant or significant customer or supplier to the company. They should not have personal service contracts with the company or its Related Parties or its senior management or be affiliated with a non-profit organization that receives significant funding from the company.

Ideally, independent directors should not be employed as an executive of another company where any of the company's executives serve on the board of directors or be a member of the immediate family of an individual who is, or has been during the past five years, employed by the company as an executive officer.

Also, they should not have been affiliated with or employed by a present or former auditor of the company in the past five years or be a controlling person of the company (or member of a group of individuals and/or entities that collectively exercise effective control over the company) or such person's brother, sister, parent, grandparent, child, cousin, aunt, uncle, nephew or niece or a spouse, widow, in-law, heir, legatee and successor of any of the foregoing (or any trust or similar arrangement of which any such persons or a combination thereof are the sole beneficiaries) or the executor, administrator or personal representative of any Person described in this sub-paragraph who is deceased or legally incompetent.

2) B. The Sebi Model

The SEBI has issued similar guidelines for the appointment of independent directors. However, these are less stringent than those recommended by the IFC. As per SEBI, the expression 'independent director' refers to a non-executive director of a company who does not have any material pecuniary relationships or transaction with the company or its promoters or directors or senior management or holding company or subsidiaries and associates, apart from receiving the director's remuneration, which may affect independence of the direction.

Independent directors must not be related to the promoters or persons occupying management positions at the board level or at once level below the board or have been an executive of the company in the preceding three financial years. They must not have been a partner or an executive or involved with the statutory audit firm associated with the company or a legal or consulting firm with material

association with the company at any time in the preceding three years. They must not be a material supplier or service provider or customer or a lessor or lessee or a substantial shareholder of the company.

A Purposive Definition

We see that comprehensive definitions have been propounded from which our understanding of independent directors emerges. We've looked at an international model and compared it with the Indian model. But what is the purpose behind instituting such expansive and rigid definitions? Since the definitions seem to heavily focus on an independent direction of thought - is there a deliberate attempt to weed out certain influences?

Randall Morck in the introduction to his paper on Independent Directors and Behavioral Finance in Corporate Governance begin with a quote by Woodrow Wilson - Loyalty means nothing unless it has at its heart the absolute principle of self-sacrifice. He goes on to discuss how misplaced loyalty lies at the heart of numerous scandals in corporate governance - where directors overlooked their duties towards the shareholders and obedience to the law in the midst of their loyalty towards over-zealous executive officers. These directors could have very well prevented some of the biggest corporate scandals - Enron, WorldCom, Hollinger and even the recent Satyam disaster by asking the right questions and demanding the answers.

It is in this light that we must examine the definitions of independent directors. These definitions put unequivocal stress on the need for ethical integrity - the core principle which demands that their decisions be free from doubt as to any conflict of interest, real or perceived, in their minds. The following chapter shall examine the role played by these directors in corporate governance

Independent Directors & Corporate Governance

Adam Smith, way back in the late 18th century, spoke about the invisible hand of self-interest that motivated the proliferation of business. Today, the situation has changed, but not by much. What has come to be of concern is the self-interest in the working of directors within a corporation.

Governance, it is said, is about 'steering' a company in the right direction. The SEBI Chairman, Mr M Damodaran, described corporate governance as a continuing process beyond the mere scope of legislation. What he implied was that governance mandates practices for which the legislative requirements should only be the starting point. Companies must heed to these practices not because of fear of sanction, but because in the absence of such governance the companies would fail to achieve true profitability. In his address, the Chairman spoke of independent directors as functionaries who contribute to the Board with their divergent views. Another speaker referred to them as the "conscience keepers" who could guide the company towards its right interests when others may have been influenced by other interests.

Other thinkers have described corporate governance differently. While some have thought of it as a journey and

not a destination, a few have compared it to "trusteeship". But irrespective of these different approaches, the subject matter and purpose of corporate governance remains undisputed - even more so vis-à-vis the role played by independent directors.

Independent directors broadly fit into the overall structure of corporate governance. Their appointment ensures an effective and balanced composition of the boards. It is widely recognized that the board of directors is the most significant instrument of compliance with corporate governance. Ergo, the constitution of this board and its supervision is of utmost importance. Putting this in perspective, the guidelines for the selection of independent directors is fortified by regulatory mechanisms which seek not only to provide for the qualification of these directors but also to secure a minimum fixed proportion of such independent directors on the board.

The independent directors contribute to this board by constructively challenging development of policy-decisions and company strategies. They also scrutinize the performance of the management and hold them accountable for their actions. Their independence, on account of lack of affiliation which is likely to prejudice their decisions, allows them to fulfil these tasks more efficiently. While they are answerable for the company's actions, they are less likely to be affected by self-interest in these actions.

This puts them in a unique and advantageous position to question the company's practices. It is because of this fact that, in practice, independent directors have conventionally been viewed as "adversaries" within the board. However, their position has gradually become more acceptable with the realization that independent directors bring something "more" to the table. Even when they stand in opposition to the other directors, the "tension" created within the board is nothing but positive tension. In the long run, independent directors bring with themselves a more balanced perspective.

The independent directors must meet at least once a year without the chairman or the executive directors and a statement in the annual report declares whether such a meeting was conducted or not. This is, again, to encourage the independent and uninfluenced judgment of the independent directors while keeping in mind the accountability owed to the shareholders of the company and to dissuade any self-interest to creep into the management of the affairs.

Apart from attending the Annual General Meetings and discussing the issues relating to their non-executive roles (which may vary depending on the company), they periodically review legal compliance reports prepared by the company and review the steps taken by the company to rectify any short-comings.

What is interesting to note is the considerable effort, via institutional guidelines, to encourage the appointment of independent directors. For instance, the New York Stock Exchange regulations demand that a majority of the board of directors of a listed company comprise of independent directors, for which it provides a stringent qualification. In addition, companies listed on the exchange must

compulsorily have certain committees (such as Corporate Governance Committee, Audit Committee, etc.) which must consist only of independent directors. Ever since the practice of appointment of independent directors has been recognized as a legitimate means to bring about more transparency in corporate governance, increasingly more countries have adopted similar guidelines.

In the past, Indian corporate sector has faced major criticism for its poor corporate governance compliance record, as the presence of large family-dominated businesses has posed serious threats to transparency and accountability.

Traditionally, the major stake holders in most of these enterprises have been family members who did not find it compelling to reveal sufficient information to the independent directors. Keeping a check on the accountability and transparency became an arduous task for the independent directors especially because they attended very few meetings a year which were to a large extent ceremonial in nature. This did not make it possible for independent directors to fully comprehend the issues before the board and to be accountable in large business structures which were often conglomerates having diverse interests and investments. This may be contrasted with the more efficient western enterprises where independent directors are viewed as partners of management and as "outside guardians" whose job is to make sure that the management stays focused on delivering shareholder value.

The New Clause 49: Independent Directors get a Boost

In India, the Securities and Exchange Board of India monitors and regulates corporate governance of listed companies through Clause 49 of the Listing Agreement. Influenced by the Sarbanes-Oxley Act of 2002 in the United States of America and the New York Stock Exchange regulations in 2003, SEBI launched a landmark initiative towards achieving higher corporate governance standards. SEBI issued Clause 49 of the Listing Agreement which was to apply to companies in a phased manner. It applied first to all Group-A companies and then to other listed companies with a minimum paid-up capital of Rs 10 crore / net worth of Rs 25 crore and finally to Companies with paid up capital of Rs 3 crore / net worth of Rs 25 crore. Later, SEBI amended the original clause and issued a new Clause 49 with several changes.

The new Clause 49 lays down a more stringent qualification for independent directors than the old clause and took away the discretionary power conferred upon the board to decide whether the independent director's material relationship with the company had affected his independence apart from increasing the number of mandatory board meetings from 3 to 4. The minimum number of audit committee meetings was also increased from 3 to 4.

As already discussed, Clause 49 lays down an inclusive definition wherein independent directors are those directors who do not have a pecuniary relationship with the company, its promoters, management or its subsidiaries, which may affect the independence of their judgment. This is in contrast

with the British definition based on the Higgs report, which is an exclusive definition specifying who cannot be appointed as an independent director. The latter appears to be more appropriate as it clearly provides who is not acceptable as an independent director while the Indian definition seems too restrictive.

Do we really need Independent Directors?

The introduction of the new guidelines faced stiff resistance. The foremost argument against its implementation was that there was a paucity of qualified personnel. Most of the listed companies, out of 9000, were required to comply with Clause 49 of the Listing Agreement by 31 December 2005, which mandates that Independent Directors should constitute 50% of their Boards; otherwise the defaulting companies will have to face severe penalties. An estimate puts the requirement of Independent Directors at over 30,000.

Moreover, it was argued that such directors who would attend very few board meetings (a minimum of four a year) and may tend to be obtrusive to the functioning of the board by professing their expertise without fully appreciating the conduct of the affairs. Besides, in the context of family-dominated Indian companies, where the promoters' interests often over-shadow those of the share-holders, the independent directors may not be in a position to exert sufficient influence.

The first argument may be outright dismissed. It is unimaginable to think that in a country as populous as ours, finding qualified personnel could prove to be too onerous. Even if so, there is no reason to suggest that there is sufficient talent to appoint directors but not independent directors or that those with materially significant dealing with the company are likely to be any more qualified than those independent of such dealings. With the appropriate training, this paucity could very easily be overcome and pave the way for a more promising corporate governance regime. It has been pointed out that this, in fact, is a legitimate concern and it would perhaps take some time before the demand-supply gap could be effectively bridged, it is nonetheless a necessary move.

As far as the second argument is concerned, the argument may be turned around on itself. India must continue to strengthen the institutional support towards independent directors to safeguard the interests of its industry. Independent directors must be allowed to be more involved with the board of directors and more vocal with their contributions to play an effective role. Our experience has shown that thus far, the only reason why independent directors have successfully averted potential fiascos and promoted accountability towards shareholders has been on account of their presence in considerably large numbers. This support must continue. Therefore, while it may be open to debate as to what percentage of the board must be constituted by such independent directors, the importance of having a sufficiently large number is not.

Are there any Benefits?

An analysis of the Sarbanes-Oxley effect in the New York Stock Exchange indicates that the regulations have substantially improved corporate governance standards but have increased the costs for companies to list with the Exchange by hiking their compliance costs. For instance, the compliance cost for a company with revenue of up to \$50 million, the compliance cost may be as high as \$3 million. Therefore, it concludes that compliance may, in fact, land up serving as an obstacle for listing. However, this is just one aspect of the consequences.

Research has confirmed that compliant companies do benefit with higher accountability and increased investor confidence. Some experts believe that over the next decade, it may be possible the highest levels of transparency and reliability may be achieved.

Studies suggest a positive interaction between stronger shareholder rights and higher profits, higher sales growth, lower capital expenditure and lower corporate acquisitions. In fact, investors invest more in those shares which offer them strongest democratic rights and dispose off their investments in those with the weakest rights, and earn returns of over 8.5 per cent through this exercise. A US study has also found a link in between the increased sensitivity of CEOs towards performance and increased representation of independent directors.

Various Committee Reports & Suggestions

The JJ Irani Committee, 2004 has recommended that the provisions of Clause 49 be extended to apply to all "large" companies. The Committee reaffirms the belief that the issue of corporate governance and independent directors are closely intertwined and presence of such directors in adequate numbers would improve governance.

With respect to widening the ambit of the Clause, the Committee suggests an approach which is sensitive to the specific kinds of companies and disagrees with a "one shoe fits all" philosophy. Wherever a company involves public interest, at least 1/3rd of the board must consist of independent directors. On the issue of nominal directors on the board who are representative of institutions, the Committee in clear terms recommends that such directors must not be equated with independent directors since they represent only sectional interests. It also elaborates on situations where independence may exist and may not exist.

The Report of the Kumar Mangalam Birla Committee, 1999 on Corporate Governance had criticized the conventional practice of hand-picking of independent directors because such selection by itself takes away the independence of the directors. This loophole is yet to be fully addressed and still presents itself as a paradox - how independent can a director be if he is dependent on the promoters for his job?

Another shortcoming which has not been sufficiently set-off is the remuneration offered to independent directors. The Birla Committee was of the view that adequate compensation

packages must be given to independent directors so that their positions become financially attractive to draw talent and ensure integrity in their working.

Even the Naresh Chandra Committee, 2002 suggested expanding the companies covered under Clause 49. Through the course of all three of the above mentioned Reports, the definition of independent directors in the Indian context has become clearer and the scope of their application widened.

The Companies Act and Independent Directors

The Companies Act looks at all kinds of directors in the same light. While it provides for a few extra compliances for whole time directors and requires the disclosure by interested directors, it does not exempt independent directors from any of the duties, liabilities or responsibilities of the board. Therefore, independent directors are woven into the corporate governance team (after all that is the very purpose of their appointment) as any other director and are bestowed with the same power as the other directors.

Sections 267 to 269 are applicable only to whole-time directors, while sections 274, 284, 291, 297, 299 and 300 are applicable to all directors. Section 309 (4) allows for separate limits and restriction to be made applicable on the remuneration of independent directors.

Apart from the liabilities that the director may invite as a corporate director, there may be other liabilities under other laws as well. Any communications addressed to the directors of the company are understood to address the independent directors as well.

For instance, in the WorldCom and Enron settlements, the liabilities extended to the independent directors to the tune of \$18 million by 10 independent directors in WorldCom and \$13 million by 10 independent directors in Enron. However, in the Indian context it may be argued that liability arises only on account of conduct or act or omission on part of the director to fulfil certain obligation, and not be the mere fact of holding an office.

Conclusion

There have been long standing demands for greater transparency in the functioning of Indian companies which are now being met with through various proposals, amongst which a greater role for independent directors has been a welcome change. The Act empowers independent directors with proper checks and balances, so that such extensive powers are not exercised in an unbridled manner, but in a rational and accountable way. The changes are a step in the right direction. They should enhance corporate governance and ensure the management and affairs of the companies are conducted in the interest of stakeholders. It is expected that these changes will thwart corporate scandals in future and insulate shareholders interest. However, since the provisions are not yet in force, the actual effectiveness and practical defects can be determined only in the time to come.

EVALUATION OF BOARD - PROCESS & TECHNIQUE*

– CS Priyanka Kumari, priyanka.icsi@gmail.com

“I can’t think of a single work group whose performance gets assessed less rigorously than corporate boards. This lack of feedback is self-destructive ...people and organizations cannot learn without feedback.

No matter how good a board is, it's bound to get better if reviewed intelligently.

– J Sonnenfeld, Harvard Business Review

The need for effective board evaluation is identified as the lesson learned from the global financial era. The economic chaos resulting from inadequate board oversight indicates the need for greater vigilance to ensure the accountability of Boards. It has never been more important in India than in the current liberal era brought by new Companies Act, 2013 and other reforms and amendments by SEBI and other recent legislative and policy changes which acknowledge the growing expectation that boards should monitor management as well as take full responsibility for the monitoring of their own performance.

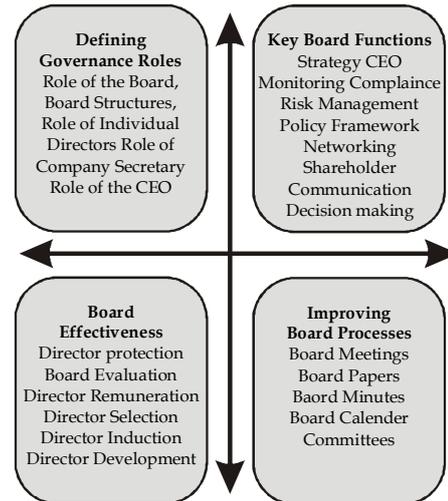
An effective board evaluation can improve the working of the board, in particular the development of the necessary team capacity to perform the roles required of it.

Beyond just producing data on relative strengths and weaknesses, a formal board evaluation can optimally result in all directors contributing to setting goals for the board.

Evaluation of the performance of the board is a process for improving board effectiveness, maximising strengths and tackling weaknesses.

Board members should evaluate their performance as a group and as individuals no less frequently than every three years, and should have clear procedures for removing board members who are unable to fulfill their responsibilities.

PROCESS AND TECHNIQUES:- There can be employed many processes and techniques for evaluating the effectiveness of board functions and the results may board. The criteria may start from the governance roles to key go for board effectiveness and improving board processes.



Source:- Kiel & Nicholson, 2003

A regular process of evaluating the board’s performance can help to identify strengths and weaknesses of its processes and procedures and to provide insights for strengthening orientation and educational programs, the conduct of board and committee meetings, and interactions with board and staff leadership.

The board evaluation process can go through some steps in simple but strategically as depicted in tabular form:-

BOARD EVALUATION FRAMEWORK AND PROCESS

Stage	Process	Options
1. Get Agreement to the Concept of Performance Management	Agree upon the purpose of evaluation.	<ul style="list-style-type: none"> To improve Board effectiveness and organizational performance. To satisfy regulatory requirements and improve accountability/stakeholder relationships.
	Agree upon the subjects of the evaluation.	<ul style="list-style-type: none"> Full board Individual Directors Board Committees
2. Establish the Criteria for Board Performance	Agree upon the content of the evaluation	<ul style="list-style-type: none"> Board Composition, Governance Structures, roles, responsibilities and skills. Board process, communication, information flow, and external relationships. Board teamwork, internal dynamics, leadership and culture.

This Article is an award winning Article in the Research Paper Competition, 2014 organized by NIRC.
 *Views expressed by the Authors are solely their own view and the Firm, NIRC or ICSI does not accept any responsibility.

Stage	Process	Options
3. Decide On Method of Board Evaluation	Who should conduct the evaluation?	<ul style="list-style-type: none"> • Self evaluation • Committee chair, • Board chair, • Company Secretary, • Independent Consult/ external source
	How should it be conducted?	<ul style="list-style-type: none"> • What should be asked? • Formal interviews. • Questionnaire • Participant observation • Informal mechanisms
4. Undertake Evaluation	Conduct Review and analyse information	<ul style="list-style-type: none"> • How frequent? • Time frame
5. Feedback	Who should review the information?	<ul style="list-style-type: none"> • Chairperson • Full Board and/or Individual directors • Senior management • Investors/regulators/stakeholders
6. Outcomes	Establish Director Development Plans and Board action Plans Monitor implementation of plans and review evaluation process	<ul style="list-style-type: none"> • Link to training/education • Link to re-election process • Link to succession planning • Link to stakeholder communication process

Board Assessment Tools and Techniques

- **BOARD SELF-ASSESSMENT (BSA)** “A strong, vibrant board of directors is a clear indicator of a healthy organization. Yet even the best organizations need a periodic check-up to ensure that they cannot just survive but will really thrive in today’s environment. To check your board’s vital signs, or to put in place practices and strategies for a healthy and energized board, the best place to start is with a board self-assessment.”

BOARD SELF-EVALUATION is a governance tool, and like any tool it has its advantages and disadvantages. At some organizations, the most prudent course of action might be not to engage in self-evaluation. The board of a private company might, for instance, be better off focusing on preparing for an upcoming IPO instead of having directors – all partners from different venture-capital firms – spend precious time evaluating one another. And it should be noted that any self-evaluation conducted in a punitive spirit will more than likely fail. Nevertheless, board self-evaluation has become an increasingly mandated practice that companies need to learn how best to adopt and implement. The ultimate goal is continuous improvement.

PEER-TO-PEER ASSESSMENT (P2P) An effective board functions as a team, but, as we all know, the success of a team depends on the efforts and skills of each individual team member. By gathering feedback from all the board members about their own individual performances as

well as the performances of their peers, one can get a rare insight into how the culture and dynamics of full board are impacted by the style and engagement of individual Board members. Peer-to-peer assessment provides individual board members with an opportunity to reflect on as well as learn from their colleagues what aspects of their service add value to the board team and what aspects might be strengthened. This process will help to get at the “soft skills” that are necessary for the board to function successfully by opening the doors to discussions on these skills and the importance of working as a team.

- **DIVERSITY AND INCLUSION ASSESSMENT (D&I)** educates and assesses the board’s progress in implementing diversity and inclusion practices and policies. Many types of diversity bring value to the boardroom. The Board Diversity in Action assessment tool focuses on age (multi-generational), gender, race/ethnicity, and socio-economics. It covers five areas to determine what phase of development your board is in relative to diversity and inclusion:
 - Overview of diversity and inclusion
 - Perception and value of diversity
 - Policies and practices
 - Recruitment practices

- Board culture and dynamics
- **BENCHMARKING REPORT** provides the criteria for comparing the board’s performance to others within the sector, by adding benchmark data to board’s report. This gives the opportunity to discover whether the board’s performance and practices are above average or whether they are lagging behind. You can view a sample benchmarking report
- **AUDIT OF BOARD**, quick and simple audit against established standards for directors and board processes (followed by appropriate action!), can lead to an immediate improvement of performance throughout the organization. That's where we come in. We can apply a knowledgeable, professional and independent overview and identify quickly, the vital areas that need to be addressed.
 - Audits of board processes against set benchmarks.
 - Audits of director skills against set benchmarks.
 - **PSYCHOMETRIC PROFILING** and **360° FEEDBACK** to discover strengths and development needs of individual directors and managers.
 - Facilitation of **CORPORATE RETREATS** for both strategy and budget planning. The evaluation may be conducted during a formal board retreat. The board may employ an outside professional, a trusted person, to administer the evaluation.
 - **VARIETY OF TECHNIQUES** are also available given in tabulated form below:-

TECHNIQUE	ADVANTAGE	DISADVANTAGE
Document Analysis	<ul style="list-style-type: none"> • Information readily available • Provides background information 	<ul style="list-style-type: none"> • Time consuming
Online Questionnaire	<ul style="list-style-type: none"> • Can gain a large amount of information in short span of time cost effective, • Confidentiality • Data can be easily compared and contrasted 	<ul style="list-style-type: none"> • Some Board members dislike questionnaires. • Difficult to get an understanding of behavioural aspects of Board effectiveness from a questionnaire alone.
Interviews	<ul style="list-style-type: none"> • Gain in-depth information. • Focus on specific issues • Explore causes behind problems 	<ul style="list-style-type: none"> • Depends on honesty of participants • Interviewer bias
Observation	<ul style="list-style-type: none"> • Evaluator can see the Board in action • First hand observation of human behaviour 	<ul style="list-style-type: none"> • People may act differently under observation. • Sensitivity of issues
Case Studies	<ul style="list-style-type: none"> • Particularly useful for outcomes base approach • Deep dive into specific areas and issues unique to the Board/organization 	<ul style="list-style-type: none"> • Time consuming

TO CONCLUDE

Overall it can not be stressed enough that it is essential that the purpose of Board evaluations is to help the Board do what it wants i.e. to perform its maximum capability by creating shareholder value and maximizing returns for shareholders. Evaluations must be supportive of the Board and the Directors whilst being rigorous and even handed, in order to give the best results.

Finally, of course it needs to be recognized that this is a continuous process, most Boards of big Companies have now been through it once, so it becomes easier – not only because the natural concern about the unknown has been removed, but also because the period being looked at is confined to the period since the previous review, rather than the indefinite period being considered at the first evaluation.

Good boards of directors continually strive for improvement.

CHAPTERS OF NIRC-ICSI : Agra, Ajmer, Allahabad, Alwar, Amritsar, Bareilly, Bhilwara, Chandigarh, Dehradun, Faridabad, Ghaziabad, Gurgaon, Jaipur, Jalandhar, Jammu, Jodhpur, Kanpur, Karnal-Panipat, Kota, Lucknow, Ludhiana, Meerut, Modinagar, Noida, Shimla, Sonapat, Srinagar, Udaipur, Varanasi & Yamuna Nagar.

CSR: RESPONSIBILITY OR LIABILITY*

– CS Nidhi Sharma, csnidhisharma24@gmail.com

Abstract

Business Organizations cannot exist in Vacuum. A responsible company always takes into account its employees, suppliers’ dealers, local communities and the nation while shaping its policies. Although much has been done in India by various entrepreneurs for elevating the CSR but still it’s on the way to receive widespread recognition. This paper explains about scenario of CSR as prevalent in India along with few examples from Corporate. A model has also been suggested to keep up the ethical business standards.

Introduction

The Concept of Corporate Social Responsibility (CSR) derives its evolution due to change in global and economic environment. Basically it is a concept by which companies articulate social, environmental and health concerns in their business policies and in their operations with stakeholders on voluntary basis. A responsible company always takes into account its employees, suppliers,

dealers, local communities and the nation while shaping its policies. If we talk about India, then it is one of the largest growing economies of the world and an important player in emerging global order and on the other hand it also home to a large number of people who are living below poverty line. Although much has been done in India by various entrepreneurs for elevating the CSR but still it’s on the way to receive widespread recognition.

What Exactly CSR is?

Although there is no worldwide accepted definition of CSR, but in precise words we can say that *“Corporate Social Responsibility is an enduring commitment by the business to behave ethically and to contribute towards economic growth while improving the Quality of Life for people residing in Society.”*

The broader perspective states that, how far you go beyond your business and contribute for achievement of societal goals.

CSR In India

Table-1: Evolution of CSR

1855-1915	1915-1960	1960-1990	1990 & onwards
Phase-1	Phase-2	Phase-3	Phase-4
Mainly charity & philanthropy	As a tool for Social Development	Mixed Economy	CSR in Globalized World in Puzzle state
Organizations solely responsible to Proprietor of Manager	Business entities established schools and colleges	Emergence of Public Sector Undertaking	Organizations responsible towards people at Large.

In India the development of CSR can be categorized in four phases. The first phase charity & philanthropy were main aspects of CSR. The second phase was during independence movement inspired by Mahatma Gandhi. During this phase many business entities established schools and colleges. The third phase was influenced by Mixed economy with the emergence of Public sector undertakings. During this phase public sector was seen as the major hauler for driving the economy but due to lack of development the focus was started shifting to Private Sector. In the fourth phase the first instigation towards Globalization, Liberalization was undertaken.

Globalization was a major tool and had transformed India into Important destination in terms of business development and growth.

Scenario on & Before, Companies Act 2013: With the surfacing of Companies Act, 2013, the directive for Corporate Social Responsibility has been introduced formally introduced to the dashboard of the Boards of Indian Companies and the industry has responded optimistically for the same. Basically In India companies tends to focus what is to be done with the profits after it is earned along with the factoring of the aspects related to social and environmental impacts conducting business. The initiative by Companies Act, 2013 will promote more transparency.

Moreover the need of the hour is to develop a framework so that companies can effectively channelize their funds and resources for

society. Even before the sprouting of Companies Act, 2013 many big entrepreneurs and Multinational Companies have taken initiatives for CSR. Let us discuss few examples for the same.

Cases in point

Wipro:

Azim Premji, the chairman and MD of Wipro, the name needs no introduction. According to him a company needs a clearly defined purpose for Corporate Social Responsibility.

Initiative of Wipro is towards Education through its campaign “Applying Thought”. Through this programme the company has engaged with more than 1000 schools, 10,000 educators, 30 organizations across 17 states in the country to bring about educational reforms. One of the programme is “JODO GYAN” – Mathematics teaching shops for NGO’S .

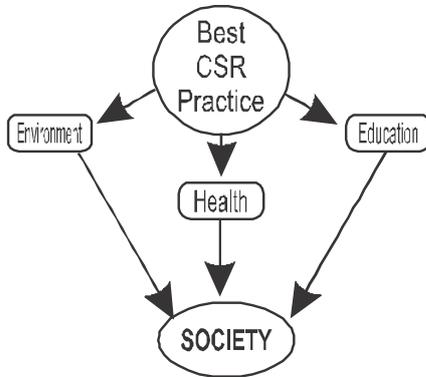
Tata Motors:

Employability & Skill Development: In order to encourage employment Tata Motors has collaboration with 112 Industrial Training Institutes across 19 states under the Institute Management Committee (IMC) Model. Tata Motors Grihini Social welfare society which employs and empowers more than 1000 women achieved a significant milestone by Crossing Turnover of Rs 13 crores.

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Suggestive CSR Framework:



CSR intent to achieve success by dealing with the legal, ethical, commercial and other expectations of the society at a large. Within this framework we have developed a new approach towards the concept of CSR.

CSR - Communal Societal Responsibility

This model suggests that companies must inculcate those activities which are related to environment, health & education at large which ultimately will help the society at large.

Why CSR?

Building Image of the Company: If a company has done something for the betterment of society at large more people become aware about that company and good image tilt the buying decision of the consumer for the company engaged in CSR activities.

Transparency: Transparency in terms of disclosures from stakeholders like customers, suppliers etc. has made the organizations to focus its energy on CSR also. Moreover Customer Retention is also increased with this.

Concern for Investor: Normally Investors take into Consideration factors like Return on Investment or they go for financial profits of the company. But now with the emergence of the Concept of CSR, this factor is also taken into consideration what exactly a company is contributing towards the development of society.

Business Opportunities: Through CSR Business is in Constant touch with the Customers, stakeholders, suppliers and other parties. Because of this continues interaction with the all business comes to know about new business opportunities as well as improvement in existing business policies or products.

The Dilemma Between Responsibility and Liability?

Now the Question is Whether Corporate Social Responsibility is responsibility or Liability.

Some organization are of view point that CSR is secondary issue for any organization and they believe that customer satisfaction is supreme for them. Furthermore they also believe that customers are only concerned with Price and Service only. Within the purview of this thought they fail to make out the important changes that are taking place across the world, which ultimately have an impact

on their business. They forgot about their duties towards society and environment and keep themselves concentrated towards profit making only without giving a thought to serve the society at large.

Whereas the organizations which are active and those who consider CSR as a responsibility are serving customers as well as society at a large and that too in very efficient way. These types of organizations not only have higher market at National Level but also at International level. They are also working on the social issues for upliftment of society.

Recent Buzz: This can be stated as highest CSR spend by Indian Conglomerate, the Tata Group spent Rs 1,000 crores on CSR in 2013-14. A significant amount of total CSR spend by the Tata Group has gone into skill development, health & education, with Tata Steel emerging as the biggest spender within the Group.

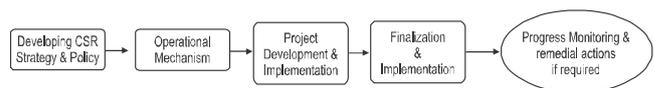
What Organizations should do?

Organizations should expand the horizon of CSR activities and they should indulge themselves in some less privileged states. Moreover organization can also develop value-chain system so as to increase the CSR related activities. They must encourage voluntarism among their employees and the same should be accompanied by incentives and appreciation. They can also encourage small and medium business to participate in CSR. Associating with NGO'S, Societies could be a good option to improve CSR.

Conclusion

To conclude the above discussion, we can say that CSR is a responsibility and Organizations should come forward to strengthen and building a Strong culture of solidarity towards CSR. The organizations should focus on performing the activities that promote people, community and cultural activities. To facilitate CSR companies should adhere to regulatory guidelines of their particular business. The companies should design a compliance programme integrating with their business model, this will help them to remain alert about the possible issues that may arise and will be able to solve the same.

Developing CSR



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AUTOMATION OF CENTRAL EXCISE AND SERVICE TAX (ACES) NOT SO COMPLICATED*

– CS Akshi Gandhi, gandhi.akshi@gmail.com

PERSONS LIABLE FOR SEEKING REGISTRATION UNDER SERVICE TAX

In terms of Section 69 of the Finance Act, 1994 [hereinafter abbreviated as 'Act'] read with Rule 4 of Service Tax Rules, 1994 [hereinafter abbreviated as 'STR, 1994'] as well as Service Tax (Registration of Special Category of Persons Rules), 2005 following are liable for seeking registration under Service Tax:

- (a) Persons providing taxable services;
- (b) Persons made liable for paying service tax as per Rule 2(1)(d) of the Service Tax Rules, 1994 under Reverse

Charge Mechanism and with effect from 01.07.2012 under Partial Reverse Charge Mechanism;

- (c) Input Service Distributor; and
- (d) Persons providing taxable services but availing benefit of threshold exemption limit of Rs. 10 lakh. These service providers are required to seek registration when the aggregate value of taxable services in a financial year exceeds Rs 9 Lacs.

TIME LIMIT FOR MAKING APPLICATION FOR REGISTRATION

Category of persons required to obtain registration	Time limit for making application for registration
Where a person starts providing taxable service before such service becomes taxable.	Within thirty days from the date when such service becomes taxable. For example Mr. X started providing Wet Cleaning Services from 15.10.2010 He was required to make an application for Registration in ST-1 latest by 31.07.2012 because these services became taxable only with effect from 01.07.2012.
Where a person starts providing taxable service after such service becomes taxable.	Within thirty days from the date of commencement of provision of taxable service in accordance. For example , Mr. Y started providing ' Promotion of Brand Services ' from 01.01.2014. He was required to make an application for Registration in ST-1 latest by 30.01.2014 because he started providing said service after such service becomes taxable with effect from 01.07.2010.
Input service distributor	Within thirty days from the date of commencement of business.
Small service providers	Within thirty days of the date in the financial year in which the aggregate value of taxable services has exceeded nine lakh rupees.
Service recipient liable to pay service tax under reverse charge mechanism or partial reverse charge mechanism, as the case may be	Within thirty days of point of trigger of reverse charge or partial reverse charge, as the case may be. For instance, Jewel Ltd., a New Delhi based Company receives Management or Business Consultancy Services from USA on 15.01.2014 for stipulated consideration of 1,00,000 U.S. Dollars. The invoice of service provider bears date of 15.01.2014. Jewel Ltd. makes aforesaid payment on 10.03.2014. If Jewel Ltd. is not already registered with the Department, then it must seek registration by 09.04.2014 i.e. within thirty days of making payment of the invoice.

Note: An application for registration under Service Tax is required to be made to the concerned Superintendent of Central Excise.

DOCUMENTS REQUIRED TO BE SUBMITTED FOR SEEKING REGISTRATION UNDER SERVICE TAX.

Central Board of Excise and Customs has specified following documents which are to be submitted by the Assessee along with the online application for registration in Form ST 1:

- (a) Copy of Permanent Account Number (PAN);
- (b) Proof of Residence;
- (c) Constitution of the Applicant; and
- (d) Power of Attorney of authorized person(s).

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*Views expressed by the Author are solely his own view and the Firm, NIRC or ICSI does not accept any responsibility.

The aforementioned documents are required to be submitted within 15 days from the submission of online application.

TIME LIMIT FOR GRANT OF REGISTRATION CERTIFICATE UNDER SERVICE TAX

The Superintendent of Central Excise shall grant a certificate of registration in Form ST-2 within seven days from the date of receipt of all the necessary

AMENDMENT IN EXISTING REGISTRATION CERTIFICATE

Where there is change in any information or details furnished by Assessee in Form ST-1 at the time of obtaining registration or he intends to furnish any additional information or detail, he is duty bound to inform such change or details, in writing. However, it is pertinent to add here that consequent upon mandatory on-line registration with effect from 30.09.2009, application for any amendment in registration certificate is also required to be made on-line. Subsequently, the hard-copy of the relevant specified documents is to be filed along with print out of acknowledgment of submission of amendment application.

Further such information has to be furnished within 30 days from the date of such change.

PROCEDURE FOR ONLINE REGISTRATION/AMENDMENT

- (i) The user needs to log onto the system, through internet at <http://www.aces.gov.in>
- (ii) He/she chooses the Service Tax button from the panel appearing on the webpage.
- (iii) Clicks the button "New Users Click here to Register with ACES" in the Log-in-screen that appears after clicking Service Tax button.
- (iv) Fills in and submit the form "Registration with ACES", by furnishing a self-chosen user ID, e-mail ID, Unit Name, Designation and Phone Number.
- (v) Those fields marked with asterisk ("*") in ACES application are mandatory fields and the same are to be filled before proceeding further.
- (vi) User ID, once chosen is final and cannot be changed by the assessee in future.
- (vii) On first Login user can change the password and choose a new password, a hint question and answer.
- (viii) The user then re-logs-in and proceeds with the statutory registration with Service Tax, by filling-in Form ST-1 by clicking the "Reg" link in the Menu bar that appears on the top of the screen. For security reasons, the password should be changed immediately.
- (ix) The system instantaneously generates a registration number after which the registration request goes to AC/DC. Depending on the instructions in force, Assessee may be required to submit certain documents to the department for verification. After due processing, message to this effect is sent to the Assessee

electronically. The Assessee can view this and take a print-out of this.

- (x) Depending on the option chosen by the Assessee, the signed copy of the RC can be sent by post or can be collected by Assessee in person.
- (xi) While submitting registration form, whenever the Assessee makes a mistake in choosing the jurisdiction (Commissionerate/Division/Range), ACES provides a facility to the AC/DC to forward the application to the correct jurisdictional officer to issue registration.

REGISTRATION FOR PERSONS EXCLUSIVELY ENGAGED IN EXPORT OF TAXABLE SERVICES.

Hon'ble Chennai has, inter alia, held in *Textech International (P) Ltd. Vs Commissioner of Service Tax, Chennai 2011(21) S.T.R. 289 (Tri-Chennai)* that according to provisions of Section 69 of The Finance Act, 1994 read with Rule 4(1) of the Service Tax Rules, 1994 only a person who is liable for paying the Service Tax is required to apply for Registration. Since the appellants in this case have exported their entire output service, they were not required to pay the service tax and hence the law does not mandate them to take registration compulsorily. Similarly, in *Wipro BPO Solutions Limited V. CST[2012] 34 STT 190(CESTAT- New Delhi)* it was inter alia held that a hundred per cent exporter is not liable to pay service tax in terms of Rule 4 of the erstwhile Export of Services Rules, 2005. Thus, he is not a person liable to pay service tax requiring registration under section 69 of the Act.

CENTRALISED REGISTRATION

In the following cases person is liable to get centrally registered with the department:

- (i) If services are provided from more than one premises or offices [for instance Banking Services, Management, Maintenance or Repair Services, Business Management or Business Consultant's Services, Practicing Chartered Accountant's Services]; or
- (ii) Receives such service in more than one premises or offices [for instance Transport of Goods by Road [GTA] Services, Sponsorship Services provided to body corporate or firm located in India, Insurance Agent's Services where he is liable to pay service tax under reverse charge mechanism]; or
- (iii) Is having more than one premises, which are engaged in relation to such service in any other manner, making such person liable for paying service tax [for instance services provided or agreed to be provided by any person who is located in a non-taxable territory and received by any person located in the taxable territory where the person receiving service is liable for paying service tax]

In the above cases, such person is given the option to obtain centralized registration provided he satisfies the following cumulative conditions:

(a) He has centralized billing system or centralized accounting system in respect of such service; and

(b) Such centralizing billing or centralized accounting systems are located in one or more premises.

SURRENDER/CANCELLATION OF REGISTRATION CERTIFICATE

SURRENDER OF REGISTRATION CERTIFICATE-When a registered Assessee ceases to provide the taxable service for which he is registered, he shall surrender his registration certificate.

PROCEDURE FOR SURRENDER OF REGISTRATION CERTIFICATE

- (1) Assessee can submit online request for surrendering their Registration Certificate in ACES through: REG->Surrender.
- (2) Once the surrender request is submitted by the Assessee, approval process passes through the Superintendent and then AC/DC. Assessee will receive an auto generated mail from the system once his surrender request is

approved and accepted. Thereafter, Assessee shall be required to submit following documents with the Department:

- (A) Print out of the acknowledgment of surrender of Registration Certificate generated from ACE;
 - (B) An undertaking to pay any amount which becomes due from him;
 - (C) Hard copy of the last four Service Tax Returns;
 - (D) Hard Copy of Registration Certificate granted by the Department i.e. ST-2
- (3) It may also be pertinent to add here that Assessee will not be able to login to the ACES application once Registration has been surrendered.

PENALTY FOR NON REGISTRATION

If any person who is liable to pay service tax or who is required to take registration, fails to take registration in accordance with the provisions of section 69 or rules made there under, then shall be liable to a penalty which has been exhibited in the following table:

Relevant Period	Penalty	Relevant provisions of the Act
With effect from 10.05.2013 08.04.2011 to 09.05.2013	Any amount which may extend to Rs. 10,000/- Higher of the following two amounts: (a) Any amount which may extend to Rs. 10,000/- (b) Rs. 200/- for every day of default	Section 77(1)(a)
10.05.2008 to 07.04.2011	Higher of the following two amounts: (a) Any amount which may extend to Rs. 5,000/- (b) Rs. 200/- for every day of default	Section 77(1)(a)
10.09.2004 to 09.05.2008	Any amount which may extend to Rs. 1,000/-	Section 77

PAYMENT OF ANNUAL MEMBERSHIP AND CERTIFICATE OF PRACTICE FEE FOR THE YEAR 2014-2015

The annual membership fee and certificate of practice fee for the year 2014-15 became due for payment w.e.f. 1st April, 2014. The last date for payment of fee was 30th June, 2014 which has now been extended upto 31st August, 2014. However, 31st August, 2014 being Sunday, the last date will be 1st September, 2014.

The membership and certificate of practice fee payable is as follows:

- Annual Associate Membership fee Rs.1125/- (*)
- Annual Fellow Membership fee Rs.1500/- (*)
- Annual Certificate of Practice fee Rs.1000/- (**)

* A member who is of the age of sixty years or above can claim 50% concession and a member who is of the age of seventy years or above can claim 75% concession in the payment of Associate/Fellow Annual Membership fee subject to the furnishing of declaration in writing duly signed that the member is not in any gainful employment or in practice.

** The certificate of practice fee must be accompanied by a declaration in form D duly completed in all respects and signed.

The requisite form 'D' is available on the website of Institute www.icsi.edu.

MODE OF REMITTANCE OF FEE

The fee can be remitted by way of: Online mode through payment gateway of the Institute's website (www.icsi.edu) Cash/Cheque at par/Demand draft or Pay order payable at New Delhi (indicating on the reverse name and membership number) drawn in favour of 'The Institute of Company Secretaries of India' at the Institute's Headquarter or Regional/Chapter offices.

For queries, if any, the members may please write to Mr.Saurabh Bansal, Asst. Education Officer at email id Saurabh.bansal@icsi.edu.

WHEN CROWN'S DEBT HAS PRIORITY OVER SECURED DEBT*

– CS C.M. Bindal

INTRODUCTION:

The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "Securitisation Act") introduced major changes in legal framework for transactions in financial market. For the first time non-possessory securities are made enforceable by banks and financial institutions. Resultantly, all mortgages and charges on immovable properties in favour of banks and financial institutions are now made enforceable without the intervention of the courts.

ENFORCEABLE PROVISIONS:

Section 13(1) of Securitisation Act stated: "Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882, any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act."

Under provision of section 13(2) of said Act, the secured creditor is required to give a notice in writing to borrower to discharge in full all liabilities, failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4), viz. take possession of, or takeover management of, the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset, etc.

Pursuant to provision of section 35 of said Act, provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. It makes very clear that any provision in any other law which is inconsistent with provisions of this Act shall, not be applicable and the provisions of this Act shall have overriding effect over such inconsistent provisions in other laws and instruments.

The above most important and crucial provision confers power of enforcement of securities on the secured creditors without the intervention of the court or tribunal, in accordance with provisions of this Act. And provisions of this Act have overriding effect over all other inconsistent provisions under any law for the time being in force.

CROWN'S DEBT:

Generally, the tax dues payable to the Government, viz. excise duty, custom duty, income-tax, sales tax, cess and other duties as prescribed are known as Crown's dues or debts.

Pursuant to section 11 of Central Excise Act, 1944, the outstanding duty from any person may be recovered by attachment and sale of excisable goods belonging to such person; and if the amount payable is not so recovered, the officer empowered may prepare a certificate signed by him specifying the amount due from the person liable to pay the same and send it to the Collector of the district in which such person resides or conducts his business and the said Collector, on receipt of such certificate, shall proceed to recover from the said person the amount specified therein as if it were an arrear of land revenue. Similar provisions for recovery of outstanding tax dues exist in the Customs Act, 1962. However, these provisions do not contain any provision claiming 'first charge' over the properties of the person liable to pay the tax dues.

Pursuant to provisions of Madhya Pradesh General Sales Tax Act, 1958 wherein section 33C laid down for 'first charge' on the property of the dealer or such person, the Hon'ble Apex Court, in State of MP v. State Bank of Indore (2002) 10 SCC 441, observed, "Section 33C creates a statutory first charge that prevails over any charge that may be in existence. Therefore, the charge thereby created in favour of the State in respect of the sales tax dues of the second respondent prevailed over the charge created in favour of the Bank in respect of the loan taken by the second respondent.....".

Similar view had been expressed by the Hon'ble Apex Court in State Bank of Bikaner & Jaipur v. National Iron & Steel Rolling Corporation (1995) 96 STC 612, 616, where similar provision exist under section 11AAAA of Rajasthan Sales Tax Act, 1954. In another case, Thane Janata Sahakari Bank Ltd. V. Commissioner of Sales Tax (2006) 74 CLA (Snr.) 8 (Bom), the Hon'ble Bombay High Court made observation that section 35 (of Securitization Act) has no effect whatsoever in the operation of section 38C of Bombay Sales Tax Act. It does not override section 38C and, therefore, based on it, the bank does not get precedence or for that matter priority over the statutory first charge under section 38C of the Bombay Sales Tax Act. Rather the statutory first charge under section 38C of Bombay Sales Tax Act has precedence over the Bank's charge based on contract.

The principle of priority of Government debts is founded on the rule of necessity and of public policy. The basic justification for the claim for priority of State debts rests on the well recognized principle that the State is entitled to raise money by taxation because unless adequate revenue is received by the State, it would not be able to function as a sovereign government at all. In a case, Builders Supply Corporation v. Union of India AIR 1965 SC 1061, the Supreme Court had noticed a consensus of judicial opinion that the arrears of tax due to the State can claim priority over private debts, being the law in force within the meaning of article 372(1) and continues to be in force. Private debts would mean the unsecured debts/loans.

JUDICIAL VERDICT:

In ICICI Bank Ltd. V. Official Liquidator (2005) 1 CTC 758, the Division Bench of the Apex Court concluded as under : "This issue is no longer res integra in view of the decision of the Supreme Court in Dena Bank v. Bhikhabhai Prabhudas Parekh & Co., (2006) 8 Comp LJ 323 (SC)/(2000) 4 CTC 170/(2000) 5 SCC 694, vide para 10 where it has been held that the claim of a secured creditor will prevail over crown debts."

In similar other case, viz. UTI Bank Ltd. V. Deputy Commissioner of Central Excise (2007) 77 CLA 131 (Mad.-FB), the Hon'ble Madras High Court observed as under :-

"26. In the case on hand, the petitioner-bank which took possession of the property under section 13 of the SARFAESI Act, being a special enactment, undoubtedly is a secured creditor. We have already referred to the provisions of the Central Excise Act and the Customs Act. They envisage procedures to be followed and how the amounts due to the Departments are to be recovered. There is no specific provision either in the Central Excise Act or the Customs Act, claiming 'first charge' as provided in other enactments, which we have pointed out in earlier paragraphs."

"27. In the light of the above discussion, we conclude:

- (i) Generally, the dues to Government, i.e., tax, duties, etc. (Crown's debts) get priority over ordinary debts.
- (ii) (ii) Only when there is a specific provision in the statute claiming 'first charge' over the property, the Crown's debt is entitled to have priority over the claim of others."

Under provisions of section 326 of Companies Act, 2013 (corresponding to section 529A of 1956 Act) which is yet to come into force, the overriding preferential payments in the winding of a company shall cover the workmen's dues and debts due to secured creditors only. However, the preferential payments under section 327 of 2013 Act (corresponding to section 530 of 1956 Act) which is yet to come into force, give first priority to the taxes due to any Government or local authority (Crown's debt) over all other claims in the case of winding up of a company.

CONCLUSION:

Unless the Central or State law clearly specifies being their 'first charge' over the properties of the person liable to pay the tax dues, the Crown's debt does not get precedence over the secured debts of bank under the Securitisation Act, as also under the Companies Act.

*Views expressed by the Authors are solely their own view and the Firm, NIRC or ICSI does not accept any responsibility.



COMPLIANCE CHECKLIST FROM 1ST AUGUST TO 10TH SEPTEMBER, 2014

Central Excise Related Compliance						
S. No.	Activities	Sections/Rules/Clauses, etc.	Acts/Regulations etc.	Compliance Due Date	To whom to be submitted	
1.	Last Date for payment of Excise Duty Non SSI units (July) *(in case of Payment through Internet banking)	Rule 8	Central Excise Rules, 2002	05 th August *06 th August	Central Authorities	Excise
2.	Monthly Return of information relating to Principal Inputs (July, 2014) (Form No. ER-6)	Rule 9A	CENVAT Credit Rules, 2004	10 th August	Central Authorities	Excise
3.	Filing of Return of Central Excise and Cenvat Credit for the month of July, 2014 (Form No. ER-1) (Non SSI Units)	Rule 12 / Rule 9(7)	Central Excise Rules, 2002/ CENVAT Credit Rules, 2004	10 th August	Central Authorities	Excise
4.	Monthly Excise return by EOU for the month of August, 2014 (Form No. ER-2)	Rule 17(3)	Central Excise Rules, 2002	10 th August	Central Authorities	Excise
5.	Last Date for payment of Excise Duty SSI units (July) *(in case of Payment through Internet banking)	Rule 8	Central Excise Rules, 2002	15 th August *16 th August	Central Authorities	Excise
6.	Last Date for payment of Excise Duty Non SSI units (August) *(in case of Payment through Internet banking)	Rule 8	Central Excise Rules, 2002	05 th September *06 th September	Central Authorities	Excise
7.	Monthly Return of information relating to Principal Inputs (August, 2014) (Form No. ER-6)	Rule 9A	CENVAT Credit Rules, 2004	10 th September	Central Authorities	Excise
8.	Filing of Return of Central Excise and Cenvat Credit for the month of August, 2014 (Form No. ER-1) (Non SSI Units)	Rule 12 / Rule 9(7)	Central Excise Rules, 2002/ CENVAT Credit Rules, 2004	10 th September	Central Authorities	Excise
9.	Monthly Excise return by EOU for the month of August, 2014 (Form No. ER-2)	Rule 17(3)	Central Excise Rules, 2002	10 th September	Central Authorities	Excise
Service Tax Related Compliances						
10.	Pay Service Tax in Challan GAR - 7, collected for the month of July 2014 by persons other than individuals proprietors and partnership firms. *(in case of Payment through Internet banking)	Section 68 Read with Rule 6	Finance Act, 1994 Service Tax Rules, 1994	05 th August *06 th August	Service Authorities	Tax
11.	Pay Service Tax in Challan GAR - 7, collected for the month of August 2014 by persons other than individuals proprietors and partnership firms. *(in case of Payment through Internet banking)	Section 68 Read with Rule 6	Finance Act, 1994 Service Tax Rules, 1994	05 th September *06 th September	Service Authorities	Tax
Income-tax Related Compliances						
12.	Contractor's Bill / Advertising / Professional service Bill - TDS collected for the previous month Section 194J (July, 2014)	Section 194C Section 194J	Income-tax Act, 1961	07 th August	Income Authorities	Tax
13.	Monthly payment of TCS (July, 2014)	Section 206	Income-tax Act, 1961	07 th August	Income Authorities	Tax
14.	TDS from Salaries for the previous month (July 2014)	Section 192	Income-tax Act, 1961	07 th August	Income Authorities	Tax
15.	Deposit TDS from salaries for the previous month in Challan No.281 (July)	Section 192	Income-tax Act, 1961	07 th August	Income Authorities	Tax
16.	AIR - Annual Information Return	Section 285BA	Income-tax Act, 1961	31st August	Income Authorities	Tax
17.	Contractor's Bill / Advertising / Professional service Bill - TDS collected for the previous month Section 194J (August, 2014)	Section 194C Section 194J	Income-tax Act, 1961	07 th September	Income Authorities	Tax
18.	Monthly payment of TCS (August, 2014)	Section 206	Income-tax Act, 1961	07 th September	Income Authorities	Tax
19.	TDS from Salaries for the previous month (August 2014)	Section 192	Income-tax Act, 1961	07 th September	Income Authorities	Tax
20.	Deposit TDS from salaries for the previous month in Challan No.281 (August)	Section 192	Income-tax Act, 1961	07 th September	Income Authorities	Tax



RBI Related Compliances					
S. No.	Activities	Sections/Rules/ Clauses, etc.	Acts/Regulations etc.	Compliance Due Date	To whom to be submitted
21.	Monthly return (NBS-6) on exposure to capital market	Para 13B	NBFC Prudential Norms (Reserve Bank) Directions, 1998	07 th August	RBI
22.	Monthly Return on Important Financial Parameters	DNBS (RID) C.C. No.57/02.05.15/20 05-06 dated Sep 6, 2005	Circular	07 th August	RBI
23.	Reporting of actual transactions of ECB in form ECB-2 within 7 working days (July)	ECB Rules	FEMA, 1999	08 th August	RBI through Authorized Dealer
24.	Monthly statement of short term dynamic liquidity in Form ALM-I	DNBS (PD).CC.No.15 /02.01/2000-2001 dated June 27, 2001	Circular	10 th August	RBI
25.	Monthly return (NBS-6) on exposure to capital market	Para 13B	NBFC Prudential Norms (Reserve Bank) Directions, 1998	07 th September	RBI
26.	Monthly Return on Important Financial Parameters	DNBS (RID) C.C. No.57/02.05.15/20 05-06 dated Sep 6, 2005	Circular	07 th September	RBI
27.	Reporting of actual transactions of ECB in form ECB-2 within 7 working days (August)	ECB Rules	FEMA, 1999	08 th September	RBI through Authorized Dealer
28.	Monthly statement of short term dynamic liquidity in Form ALM-I	DNBS (PD).CC.No.15 /02.01/2000-2001 dated June 27, 2001	Circular	10 th September	RBI
Economic, Industrial & Labour Law Related Compliances					
29.	Monthly payment of Provident Fund (PF) (Non Corporate)	(a) Paragraph 38 of Employees Provident Funds Scheme, 1952 (b) Section 418 of the Companies Act, 1956	(a) Employees' Provident Funds and Misc. Provisions Act, 1952 (b) Exempted Scheme	15 th August	Provident Fund Authorities Trustees of Provident Fund
30.	File monthly return for employees leaving / joining during the month of July (Form No.5)	Paragraph 20(2) read with Paragraph 36(1) & (2)	The Employees Pension Scheme, 1995 (For exempted establishments under Employees Provident Fund and Misc. Provisions Act, 1952)	15 th August	Provident Fund Commissioner
31.	i) File monthly Return of employees entitled for membership of Insurance Fund (Form No.2(IF)) ii) File monthly Return for members of Insurance Fund leaving service during the month of July (Form no. 3(IF)) iii) File monthly return of members joining service during the month of July (Form no.F4(PS))	Paragraph 10	The Employees Deposit Linked Insurance Scheme, 1976 (For exempted establishments under Employees Provident Fund and Misc. Provisions Act, 1952)	15 th August	Provident Fund Commissioner
32.	Payment of ESI contribution for the previous month	Regulation 31	Employees' State Insurance Act, 1948 and Employees State Insurance (Gen.) Regulations, 1950	21 st August	ESIC Authorities
33.	Monthly return of Provident Fund for the previous month (July) Provident funds	Paragraph 38 of Employees' Provident Act, 1952	Employees Provident Funds and Misc. Scheme, 1952	25 th August	Provident Fund Authorities
34.	Monthly return of Provident Fund for the previous month with respect to International Workers.	Paragraph 36	The Employees' Provident Funds Scheme, 1952	25 th August	Provident Fund Authorities



S. No.	Activities	Sections/Rules/ Clauses, etc.	Acts/Regulations etc.	Compliance Due Date	To whom to be submitted
35.	Annual Membership and Certificate of Practice fee for the year 2014-15	See Reg. 10, 13 & 14 (Form D)	The Institute of Company Secretaries of India	31 st August	ICSI
Stock Exchange / Listing Compliance					
36.	Furnish Unaudited quarterly financial results in the prescribed format	Clause 41	Listing Agreement	14 th August	Stock Exchanges
37.	Submit Limited Review Report for the quarter	Clause 41	Listing Agreement	14 th August	Stock Exchanges
Depositories					
38.	Submit monthly statement on substitution of names of depositories in the previous quarter.	Regulation 54(5)	SEBI (Depositories & Participants) Regulations, 1996	07th August	Depositories
39.	Submit monthly statement on substitution of names of depositories in the previous quarter.	Regulation 54(5)	SEBI (Depositories & Participants) Regulations, 1996	07th September	Depositories

Note : While every care has been taken in the preparation of this Compliance Check List for the Month of August, 2014, to ensure its accuracy at the time of publication, NIRC - ICSI assumes no responsibility for any errors which despite all precautions, may be found therein. Members are requested to check the latest position with the original sources before acting upon the information published in this newsletter. Neither this Newsletter nor the information contained herein constitutes a contract or will form the basis of a contract. The material contained in this document does not constitute/ substitute professional advice that may be required before acting on any matter.

LIGHTER SIDE OF THE PROFESSION

"What is your experience of the professional world"?

"Sir, I have worked as a Company Secretary Cum Personnel Manager'.

"Do you have experience of Time Management"?

"Sir, for me 2007 to 2010 was a bad time and 2011 to 2014 was a good time. In both good and bad time I managed the things very well."

"Do you know that the Office Secretary has got the double promotion for her fine performance?"

"Oh no."

"Why do you get upset with the Double Increment of Office Secretary"?

"In my previous company, the scenario was the same and after few years, the Office Secretary was found to be the most overpaid Secretary and thus finally her services were dispensed with by the management."

– CS PRAMJEET SINGH, pslawadvisers@yahoo.com

Members may send their contribution for this column at e-mail niro@icsi.edu for publication in the NIRC Newsletter-Insight. Decision of the Editorial Board of Newsletter in this regard will be final.

LEGAL UPDATES

Radhey Mohan Sharmapetitioner(s)

Vs.

Deputy Commissioner of Income Tax (OSD)

....respondent(s)

Special Civil Application No. 1921 of 2005

Date : 12/02/2014

Principally, the concept of corporate body being an independent entity enjoying existence independent of its directors, is a well known principle. Its assets are distinct and separate and distinct from those of its members. Its creditors cannot obtain satisfaction from the assets of its members. However, with ever developing world and expanding economic complexities, the Courts have refused to limit the scope and parameters or areas where corporate veil may have to be lifted. In the present petition, the challenge is made by the petitioner to the order of the Revenue passed under section 179 of the Income-tax Act, 1961(

Facts of Case:

- M/s. Blue Information Technology was a Public Limited Company incorporated vide certificate of Incorporation dated May 25, 1992. It came out with a public issue in June, 1996.
- The petitioner (director) of the said Company resigned on September 06, 1997.
- The petitioner was an ordinary Director, not connected with the day-to-day activities of the company nor was he an executive Director
- The company was assessed for the assessment year 1995-96, 1996-97 and 1997-98. The substantial tax demands were raised against the Company.
- The notice was issued under section 221(1) of the Act seeking to recover penalty for non-payment of dues of the company to the tune of Rs.297 Lakh.
- The petitioner replied to the same inter-alia stating that he was no longer associated with the company since many years and he cannot be held liable for any tax demand raised against the company.
- The order is passed holding that the petitioner was a director of the company and was managing the affairs of the company in his capacity as a director. Keeping in mind all the circumstances, it came to be deduced that the demands were raised due to gross neglect, misfeasance or breach of duty by the directors and as the said amount could not

be recovered from the company, the directors are to be held responsible and are liable for recovery. It was further held that M/s.Blue Information Technology Ltd. was a private limited company and by virtue of being the director during the said period for which the tax demand was raised, the director would be responsible and the petitioner, according was held liable for payment of such demands

- In response to the same an affidavit was filed contending that section 179 of the Income Tax Act imposes vicarious liability on the director of the private limited Company, it was for the Directors to ensure the payment of Government dues, which were to arise during the course of operation, to be duly paid and this outstanding demand is essentially on account of breach of duty by all the directors, including the present petitioner.
- The petitioner also challenged the very issuance/ of notice on the ground that the action under section 179 of the Act is not available to the respondent-Revenue and when non-recovery cannot be attributed to the gross neglect or misfeasance of the petitioner, such order passed under section 179 of the Act deserves to be quashed.
- Sub-section (2) of section 179 of the Act also provides the situation that where the private company converted into public company and the tax in respect of private company could not be recovered, nothing contained in sub-section (1) would be applicable to any person who was a director of such private company in relation to any tax due in respect of any income of such private company assessable for any assessment year commencing before the 1st day of April, 1962.
- The Revenue was of the opinion that the unaccounted income of the company had been misappropriately utilized by the directors, shareholders and company. The request is made for lifting the corporation veil and recover tax dues of public company. In such a situation, **the proceedings were laid down under section 179 of the Act for lifting the corporate veil.**

Judgement

On duly considering the judicial pronouncements on the said aspect and on considering the material on record, the Court did not find any need to permit the said request of lifting the corporate veil.

In the present case what was examined was, whether with a view to defeat the interest of the State some of the real beneficiaries have created complex design and web and have chosen to hide behind the corporate veil.

Section 179 of the Act itself is a creation of the statute where by the corporate veil can be pierced and original Directors of the Private Limited Company could be held liable for the outstanding tax dues of the Company. The statute, however, has created a situation whereby they can be jointly and severally held liable.

In this case, the facts are apparently clear that non-recovery of the amount of tax due to the Company could not be attributed to any gross negligence, misfeasance or breach of duty on the part of the petitioner in relation to the affairs of the private Company, but, the very action against the petitioner under section 179 of the Act, would not lie, the petition, therefore, deserves to be succeeded. For the foregoing reasons, the present petition is allowed.

Conclusion

From the above judicial pronouncements, it can be seen that concept of lifting or piercing the corporate veil as some times referred to as cracking the corporate shell, is applied by Courts sparingly and cautiously. It is however, recognised that boundaries of such principle have not yet been defied and areas where such principle may have to be applied may expand. Howsoever cautiously, the concept of piercing of corporate veil is applied by the Courts in various situations.

Two situations where such principle is consistently applied are, one where the statute itself so permits or provides for and second where due to glaring facts established on record it is found that a complex web has been created only with a view to defraud the revenue interest of the State. If it is found that incorporation of an entity is only to create a smoke screen to defraud the revenue and shield the individual. In the present case, as could be noticed, those foundational facts are completely missing. There was a non-fulfillment of the obligation by the Company of the tax demands that had arisen as a result of the assessment of all these years, nothing comes on record for the Court to permit the piercing of corporate veil. The petitioner being the director of the public limited Company this provision is non-applicable.

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**THE INSTITUTE OF
Company Secretaries of India**
IN PURSUIT OF PROFESSIONAL EXCELLENCE
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For any queries, please write to sonia.baijal@icsi.edu / nishita.singhal@icsi.edu or contact - 011-45341039.

IMMEDIATE AND URGENT NEWS FROM THE INSTITUTE

30th July, 2014

Sub: Determination of Regional Constituencies under Rule 5 of the Company Secretaries (Election to the Council) Rules, 2006

The duration of the 11th Council and the Regional Councils shall expire on 18th January, 2015. The election for constitution of a new Council and Regional Councils are tentatively scheduled on 12th December, 2014 at all places except Delhi and Mumbai. The elections at Delhi and Mumbai are tentatively scheduled on two days, i.e., on 12th and 13th December, 2014.

2. Rule 5 of the Company Secretaries (Election to the Council) Rules, 2006 provides that a member, whose name is borne on the Register of Members on 1st day of April, 2014 shall be eligible to vote in 2014 elections from the regional constituencies within whose territorial jurisdiction his/ her professional address falls on the said date provided that his/her name has not been removed from the Register on the date of publication of the list of voters. If the professional address is not borne on the Register on the relevant date, the residential address borne on the register shall determine his/her regional constituency.
3. In the case of members having their professional addresses outside India and eligible to vote, their regional constituencies shall be determined according to their professional addresses in India registered immediately before they went abroad or the residential addresses in India borne on the Register of Members on the relevant date, whichever is later.
4. The professional addresses of the members whose names are borne on the register as on date are available on the website of the Institute at: <http://www.icsi.edu/Facilities/MembersDirectory/tabid/1575/Default.aspx>. The members are advised to check their professional addresses and intimate at email Id: vikash.srivastava@icsi.edu by 21st August, 2014, if any correction in the same is required.
5. A CD carrying the list of members as on 1st April, 2014 is available to a member on payment of Rs.250 (Rupees two hundred and fifty only). A member interested in having a copy of the CD may remit Rs.250 by way of cheque at par or demand draft payable at New Delhi favouring "The Institute of Company Secretaries of India", to the Membership Directorate of the Institute at 'ICSI House', 22, Institutional Area, Lodi Road, New Delhi 110 003.
6. The annual membership fee for the year 2014-15 became due on 1st April, 2014. The last date for payment of fee has been extended up to 31st August, 2014. The 31st August, 2014, being a Sunday, the last date will be 1st September, 2014. The names of members, who do not pay annual membership fee for 2014-15 by 1st September, 2014, shall stand removed from the Register of Members w.e.f. 2nd September, 2014 and such members will not be eligible to vote or stand for elections even though their names appeared on the Register of Members as on 1st April, 2014. In order to exercise their franchise, the members are advised to pay the annual membership fee for 2014-15, if not already paid, by 1st September, 2014.
7. A member who has not yet obtained Identity Card may apply for the same by sending a scanned image of his/ her latest photograph in .jpeg format indicating his/her name and membership number at email Id: meena.bisht@icsi.edu
8. This Notice has been hosted on the website of the Institute at www.icsi.edu. This is being published in August, 2014 issue of 'Chartered Secretary' and the forthcoming issues of Newsletters of the Regional Councils.

(CS M.S. Sahoo)

Returning Officer, 2014 Elections

Notice Under Rules 5 And 21 Read with Clause (3) of Schedule 2 of The Company Secretaries (Election to the Council) Rules, 2006.

18th July, 2014

As you are aware, the duration of the 11th Council and the Regional Councils shall expire on 18th January, 2015. The election for constitution of a new Council and Regional Councils are tentatively scheduled on 12th December, 2014 at all places except Delhi and Mumbai. The elections at Delhi and Mumbai are tentatively scheduled on two days, i.e., on 12th and 13th December, 2014.

2. In pursuance of Rule (3) (i) of Schedule 2 of the Company Secretaries (Election to the Council) Rules, 2006, it is proposed to have polling booths at addresses given in column 3 of the following table at places which would have more than one polling booth:

Table: Addresses of Polling Booths

Place	Booth No.	Address
1	2	3
Kolkata	E-1	Eastern India Regional Office of the ICSI ICSI-House 3A, Ahiripukur, 1st Lane Kolkata 700 019
	E-2	The Park Institution, 12, Mohanlal street Shyambazar Kolkata - 700004
	E-3	Anglo-Arabic Secondary School 46/7, Mahatma Gandhi Road Kolkata - 700009
	E-4	Khalsa High School 73, Paddapukur Road Bhowanipur, Kolkata - 700 020
	E-5	Sarada Prasad Institution 108/18 Bidhan Nagar Road Kolkata - 700067
Delhi/	N-1	Northern India Regional Office of the New Delhi ICSI, ICSI-NIRC Building Plot No 4 Prasad Nagar Institutional Area New Delhi 110 005
	N-2	Banga Sanskriti Bhawan 18 - 19, Bhai Veer Singh Marg Gole Market New Delhi-110 001
	N-3	Delhi TB Association 9, Institutional Area Lodhi Road New Delhi-110 003
	N-4	The College of Vocational Studies Triveni Nagar Sheikh Sarai Phase II New Delhi 110 017
	N-5	Jagan Institute of Management Studies 3, Institutional Area Sector-5 Rohini Delhi-85

Place	Booth No.	Address
1	2	3
Gurgaon	N-6	AVB Public School Near Bathala Apartment 43, IP Extension Delhi 110 092
	N-7	Deenbandhu Sir Chhoturam Bhawan Jharsa Road Behind Shiv Mandir Gurgaon - 122 002
	N-8	Alpine Convent School Behind Jalvayu Towers Sector - 56 Gurgaon-122 011
Ghaziabad	N-9	DLF city club Mousari Road DLF City Phase III Near Ambience Mall Gurgaon-122 002
	N-17	Ghaziabad Chapter of NIRC of the ICSI 23B, Nehru Apartments Nehru Nagar Near Nasirpur Railway Crossing Ghaziabad-201 001
Jaipur	N-18	Vaishali Public School Plot No.216 & 216/01 Sector-IIIA Rachna Vaishali Ghaziabad-201 010
	N-19	Jaipur Chapter of NIRC of the ICSI ICSI House A-5/A, Institutional Area Jhalana Doongri Jaipur 302 004
Noida	N-20	University Maharani's College Ram Singh Road Jaipur 302001
	N-27	Jaipuria Institute of Management A-32/A Sector - 62 Noida 201301
Chennai	N-28	Rockwood School B-67, Sector 33 Noida-201 303
	S-1	Madras Stock Exchange Limited, Second Line Beach Chennai - 600 001
Bangalore	S-2	Southern India Regional Office of the ICSI, ICSI House No 9 Wheat Crofts Road Nungambakkam Chennai-34
	S-3	Dr. M G R Janaki College for Women Durgabai Deshmukh Road Chennai - 28
Bangalore	S-4	The Industrial Estate Manufacturer's Association Guindy Chennai - 600 032
	S-5	Bangalore Chapter of SIRC of the ICSI No. 5, 1st Main Road Rajajinagar Industrial Estate West of Chord Road Rajajinagar Bangalore - 560 044



Place	Booth No.	Address	Place	Booth No.	Address
1	2	3	1	2	3
Hyderabad	S-6	Institution of Agricultural Technologists New Delhi No. 15 Queen's Road Bangalore - 560 052	Pune	W-8	Muland College of Commerce Sarojini Naidu Road Mulund (West) Mumbai 400 080
	S-7	The Institute of Cost Accountants of India Bangalore Chapter No. 81, Mallikarjuna Temple Street Basavanagudi Bangalore - 560 004		W-9	ICSI-CCGRT Plot No.101, Sector-15 Institutional Area Palm Beach Road CBD Belapur Navi Mumbai-400 614
	S-8	Rotary Bangalore Indiranagar Rotary House of Service 2143, 16th E Main, HAL II Stage (Opp. BDA Park & Near Lohit Hospital) Indiranagar Bangalore - 560 008		W-10	Pune Chapter of WIRC of the ICSI 23, Mukund Nagar Corner of Lane No.1 Above Dr. Joshi Hospital Gupte market Pune 411 037
	S-9	Hyderabad Chapter of SIRC of the ICSI No.6-3-609/5 Anandnagar Colony Khairatabad Hyderabad-500 004		W-11	Mahratta Chamber of Commerce, Industries & Agriculture Pimpri Chinchward Wing Building Plot No J-462, TELCO Road MIDC Area, Ganesh Nagar, Bhosari Pune 411 026
	S-10	Hyderabad Chapter of the Institute of Cost Accountants of India CMA Bhavan Beside Dena Bank Post Office Road Sanath Nagar Industrial Estate, Hyderabad - 500018		W-12	SNDT Arts & Commerce College for Women Karve Road Pune-411038
Mumbai	S-11	YMCA S P Road, Secunderabad-500003	Ahmedabad	W-13	Ahmedabad Chapter of WIRC of the ICSI, ICSI-Maneklal Mills Complex S-2, B-Tower Chinubhai Towers Opp. Handloom House Ashram Road Ahmedabad - 380 009
	W-1	Western India Regional Office of the ICSI 13, Jolly Maker Chambers No II First Floor and Nos. 56 & 57 (5th Floor) Nariman Point Mumbai 400 021	W-14	Idea Institute of Management & Technology, 4th floor, Nakshatra Building Above HDFC Bank, Maninagar Char Rasta Maninagar Ahmedabad - 380008	
	W-2	Indian Merchants' Chamber, IMC Building, Churchgate Mumbai 400 020			
	W-3	Maharashtra Chambers of Commerce & Industries Oricion House, 6th Floor 12, K. Dubhas Marg Kala Goda, Opp. Lion Gate, Opp.Lion Gate Fort Mumbai- 400 001			
	W-4	Hindalco Industries Limited Century Bhawan, 3rd Floor Annie Besant Road Worli Mumbai 400 018			
	W-5	Pinge's Classes Pvt. Ltd Janardhan Building Near Ideal Book Depot Opp.Chhablidas School Near Shri Krishna Wada Center Dadar (West) Mumbai-400 028			
	W-6	Mehta Institute 202, B-Laran Centre M A Road, Near Andheri Railway Station Andheri (West) Mumbai 400 058			
W-7	Smt. P N Doshi Women's College Cama Lane, Ghatkopar (West) Mumbai 400 086				

3. In pursuance to clause (3) (ii) of Schedule 2 of the Company Secretaries (Election to the Council) Rules, 2006, a voter in any of the places listed in Column 1 of the above table wishing to vote at a particular polling booth listed in column 3 of the said table may send a request in writing to the Returning Officer, 2014 Elections, The Institute of Company Secretaries of India, 'ICSI House', 22, Institutional Area, Lodhi Road, New Delhi by 18th August, 2014, alongwith a copy by e-mail at e-mail ID melect2014@icsi.edu

4. This Notice has been hosted on the website of the Institute at www.icsi.edu. This is being published in August, 2014 issue of 'Chartered Secretary' and the forthcoming issues of Newsletters of Regional Councils.

M. S. Sahoo
(CS M.S. Sahoo)
Returning Officer, 2014 Elections



Safeguarding and caring for your well being



COMPANY SECRETARIES BENEVOLENT FUND

Be a proud member of CSBF-Saathi Haath Badhana

Dear Professional Colleagues,

As you may be aware that in recent past, some of our members have died leaving behind the spouse and minor children. In some cases providing adequate financial assistance to the bereaved family becomes an impediment. Although the Managing Committee of the CSBF wanted to help the bereaved family members, but it was constrained to do so in view of financial position of the Fund.

The fund can provide the much needed financial assistance in such cases if the corpus of the Fund increases substantially which is possible if more number of members are enrolled to the fund. The members in all earnestness are therefore sincerely requested to become the members of the CSBF by paying one time Life membership fee of ₹ 7,500/-.

The payments made to the Fund are exempted under Section 80G of the Income Tax Act, 1961.

Following benefits are presently provided by the CSBF:

Financial Assistance in the event of Death of a member of CSBF:

Upto the age of 60 years

- Group Life Insurance Policy for a sum of ₹ 5,00,000

Above the age of 60 years

- Upto ₹ 2,00,000 in deserving cases on receipt of request subject to the Guidelines approved by the Managing Committee from time to time.

Other benefits subject to the Guidelines approved by the Managing Committee from time to time:

Reimbursement of Medical Expenses

- Upto ₹ 60,000/-

Financial Assistance for Children's Education (one time)

- Upto ₹ 20,000/- per child (Maximum for two children) in case of the member leaving behind minor children

I appeal to the members who have yet not become members of CSBF are requested to fill up Form-A (available on website of the Institute i.e. www.icsi.edu) and send the same along with a cheque for ₹ 7,500/- favouring 'Company Secretaries Benevolent Fund' payable at New Delhi to the Regional Director, NIRC of ICSI, 4, Prasad Nagar Institutional Area, New Delhi. Members may also apply online at www.icsi.edu

Looking forward to receive positive response for this noble cause.

Yours sincerely,

CS SHYAMAGRAWAL

Chairman, NIRC- ICSI

Mobile : 09314923451

Email : info@shyamagrawal.com; chairman.nirc@icsi.edu

If undelivered, please return to :
**Northern India Regional Council of the
Institute of Company Secretaries of India**
4, Prasad Nagar Institutional Area,
New Delhi-110005